Supreme Court, U.S.
FILED
FEB 23 2004
OFFICE OF THE CLERK

No. 03-750

In the Supreme Court of the United States

GARY SHERWOOD SMALL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

THEODORE B. OLSON
Solicitor General
Counsel of Record
CHRISTOPHER A. WRAY
Assistant Attorney General
JOHN A. DRENNAN
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the phrase "convicted in any court" in the federal statute that prohibits felons from possessing firearms or ammunition, 18 U.S.C. 922(g)(1), includes convictions entered by the courts of foreign countries.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	7
Conclusion	12

TABLE OF AUTHORITIES

Cases:

Bean v. *United States*, 89 F. Supp. 2d 828 (E.D. Tex. 2000), aff'd, 253 F.3d 234 (5th Cir. 2001), rev'd on other grounds, 537 U.S. 71 (2002)	11
United States v. *Atkins*, 872 F.2d 94 (4th Cir.), cert. denied, 493 U.S. 836 (1989)	5, 8
United States v. *Chant*, Nos. CR 94-1149 & CR 94-0185, 1997 WL 231105 (N.D. Cal. Apr. 4, 1997), aff'd on other grounds, No. 98-10088, 1999 WL 1021460 (9th Cir. Nov. 9, 1999) (201 F.3d 445 (Table))	10-11
United States v. *Concha*:	
233 F.3d 1249 (10th Cir. 2000)	8, 9, 10
294 F.3d 1248 (10th Cir. 2002), cert. denied, 537 U.S. 1145 (2003)	9
United States v. *Gayle*, 342 F.3d 89 (2d Cir. 2003), as amended on rehearing (Jan. 7, 2004)	10
United States v. *Jalbert*, 242 F. Supp. 2d 44 (D. Me. 2003)	10
United States v. *Lee*, 428 F.2d 917 (6th Cir. 1970), cert. denied, 404 U.S. 1017 (1972)	8
United States v. *MacDonald*, 992 F.2d 967 (9th Cir. 1993)	8
United States v. *Martinez*, 122 F.3d 421 (7th Cir. 1997)	8
United States v. *Winson*, 793 F.2d 574 (6th Cir. 1986)	5, 7, 8

Statutes, regulation and rules:	Page
Armed Career Criminal Act, 18 U.S.C. 924(e)(1)	8
Immigration and Nationality Act, 8 U.S.C. 1101(a)(43)(E)(ii)	12
Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, Tit. VIII, § 817(2), 115 Stat. 386 (Oct. 26, 2001)	12
18 U.S.C. 175b(d)(2)(B)	12
18 U.S.C. 842(d)(2)	12
18 U.S.C. 842(i)(1)	12
18 U.S.C. 921(a)(20)	9
18 U.S.C. 922(a)(6)	2, 4
18 U.S.C. 922(g)	9
18 U.S.C. 922(g)(1)	*passim*
18 U.S.C. 922(h)(1) (1982)	7-8
18 U.S.C. 924(e)	8
18 U.S.C. 924(e)(1)	9
27 C.F.R.:	
Section 478.11	3
Section 478.124	3
United States Sentencing Guidelines:	
§ 2K2.1	9
§ 4A1.3	9
§ 4A1.3 comment (n.2(A)(i))	9
§ 4B1.2	9
Sup. Ct. R. 10(a)	11
Miscellaneous:	
Restatement (Third) of Foreign Relations Law (1986)	5

In the Supreme Court of the United States

No. 03-750

GARY SHERWOOD SMALL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is reported at 333 F.3d 425. The district court's opinion (Pet. App. 8a-40a) is reported at 183 F. Supp. 2d 755.

JURISDICTION

The court of appeals entered its judgment on June 23, 2003. A petition for rehearing was denied on July 23, 2003 (Pet. App. 41a-42a). On October 15, 2003, Justice Souter extended the time within which to file a petition for a writ of certiorari to and including November 20, 2003, and the petition was filed on November 17, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

A federal grand jury returned a four-count indictment against petitioner that charged him with making a false statement that was intended or likely to deceive a licensed firearms dealer with respect to the sale of a firearm, in violation of 18 U.S.C. 922(a)(6); possessing an SWD Cobray pistol in or affecting interstate commerce while having been previously convicted of an offense punishable by imprisonment for a term exceeding one year, in violation of 18 U.S.C. 922(g)(1); possessing a Browning .380 caliber pistol in or affecting interstate commerce while having been previously convicted of an offense punishable by imprisonment for a term exceeding one year, in violation of 18 U.S.C. 922(g)(1); and possessing firearm ammunition in or affecting interstate commerce while having been previously convicted of an offense punishable by imprisonment for a term exceeding one year, in violation of 18 U.S.C. 922(g)(1). Petitioner entered a conditional plea of guilty to possession of the SWD Cobray pistol, and he was sentenced to eight months of imprisonment, to be followed by three years of supervised release. The court of appeals affirmed. Pet. App. 1a-7a.

1. Section 922(g) of Title 18, United States Code, provides, in relevant part, that it is unlawful for any person

> who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;
>
> * * * * *
>
> to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

18 U.S.C. 922(g)(1). The statute further provides that the phrase "crime punishable by imprisonment for a term exceeding one year" does not include

> (A) any Federal or State offenses pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices, or
>
> (B) any State offense classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less.

18 U.S.C. 921(a)(20).

A regulation issued by the Bureau of Alcohol, Tobacco, Firearms and Explosives provides, in relevant part, that the phrase "crime punishable by imprisonment for a term exceeding 1 year" embraces "[a]ny Federal, State, or foreign offense for which the maximum penalty, whether or not imposed, is capital punishment or imprisonment in excess of 1 year." 27 C.F.R. 478.11.

2. In 1994, the Naha District Court in Japan convicted petitioner of violating Japan's Act Controlling the Possession of Firearms and Swords, the Gunpowder Control Act, and the Customs Act. Pet. App. 2a. Each offense was punishable by imprisonment for a term exceeding one year. *Ibid.*

In June 1998, petitioner purchased a handgun from a gun store in Pennsylvania. Pet. 2. Federal law required petitioner to complete a form provided by the Bureau of Alcohol, Tobacco, Firearms and Explosives before making the purchase. 27 C.F.R. 478.124. In completing that form, petitioner answered "no" to the

question "have you ever been convicted in any court of a crime for which the judge could have imprisoned you for more than one year, even if the judge actually gave you a shorter sentence?" Pet. 2. A subsequent search of petitioner's apartment, conducted pursuant to a search warrant, uncovered a Browning .380 caliber pistol and 335 rounds of ammunition. Govt. C.A. Br. 6; PSR ¶ 10.

On August 30, 2000, a federal grand jury in the Western District of Pennsylvania returned a four-count indictment against petitioner, charging him with one count of making a false statement that was intended or likely to deceive a licensed firearms dealer, in violation of 18 U.S.C. 922(a)(6), and with three counts of possessing firearms or ammunition in or affecting interstate commerce while having been previously convicted in Japan of an offense punishable by imprisonment for a term exceeding one year, in violation of 18 U.S.C. 922(g)(1). Pet. App. 8a-9a.

3. Petitioner moved to dismiss the indictment on the grounds that the reference in Section 922(g)(1) to "convict[ions] in any court" embraces only domestic convictions, and that his Japanese convictions could not be considered because they were obtained through procedures that petitioner alleged were fundamentally unfair. Pet. App. 10a. The district court denied the motion to dismiss. Responding to petitioner's argument that a conviction in a foreign court could not serve as a predicate conviction under Section 922(g)(1), the district court held that the phrase "any court" in Section 922(g)(1) was not ambiguous and thus included all courts, domestic or foreign. Pet. App. 11a-16a. The district court also rejected petitioner's claim that his convictions in Japan had been obtained unfairly. After examining the trial records from the Japanese criminal

proceeding, *id.* at 29a-39a, the district court found that the convictions were "sufficiently consistent with our concepts of fundamental fairness * * * that we may have confidence in the reliability of the fact-finding process," *id.* at 39a.[1]

4. The court of appeals affirmed. Pet. App. 1a-7a. In holding that foreign convictions could serve as predicate convictions under Section 922(g)(1), the court of appeals agreed with the reasoning of the Fourth Circuit in *United States* v. *Atkins* 872 F.2d 94, cert. denied, 493 U.S. 836 (1989), and the Sixth Circuit in *United States* v. *Winson*, 793 F.2d 754 (1986). Pet. App. 3a n.2.

The court of appeals also rejected petitioner's claim that the district court erred in recognizing the particular judgment of the Japanese court. As an initial matter, the court agreed that it was necessary to ensure that a foreign predicate conviction under Section 922(g)(1) "comports with our notions of fundamental fairness required by the U.S. Constitution." Pet. App. 5a. To provide "procedural safeguards" in this area, the court of appeals adopted Section 482 of the Restatement (Third) of Foreign Relations Law of the United States (1986), which concerns the non-recognition of foreign judgments. Pet. App. 5a-6a. That Section provides:

> (1) A court in the United States may not recognize a judgment of the court of a foreign state if:
>
> (a) the judgment was rendered under a judicial system that does not provide impartial tribunals

---

[1] The entire record for petitioner's criminal trial was submitted to the district court; accordingly, the court did not hold an evidentiary hearing as originally requested by petitioner. Pet. App. 28a-29a.

or procedures compatible with due process of law; or

(b) the court that rendered the judgment did not have jurisdiction over the defendant in accordance with the law of the rendering state and with the rules set forth in § 421.

(2) A court in the United States need not recognize a judgment of the court of a foreign state if:

(a) the court that rendered the judgment did not have jurisdiction of the subject matter of the action;

(b) the defendant did not receive notice of the proceedings in sufficient time to enable him to defend;

(c) the judgment was obtained by fraud;

(d) the cause of action on which the judgment was based, or the judgment itself, is repugnant to the public policy of the United States or of the State where recognition is sought;

(e) the judgment conflicts with another final judgment that is entitled to recognition; or

(f) the proceeding in the foreign court was contrary to an agreement between the parties to submit the controversy on which the judgment is based to another forum.

The court of appeals concluded that, applying the Restatement test, "there were no grounds for non-recognition of the Japanese conviction as the predicate offense to [petitioner's] § 922(g)(1) conviction." Pet. App. 6a

(noting that "the district court explicitly determined that the Japanese conviction comported with our concepts of fundamental fairness").

The full court of appeals denied rehearing en banc. Pet. App. 41a-42a.

DISCUSSION

Petitioner contends (Pet. 4-14) that this Court's review is warranted to resolve a conflict in the circuits on the question whether convictions obtained in the courts of foreign countries can serve as predicate offenses under 18 U.S.C. 922(g)(1).[2] The government agrees that there is a circuit conflict, and that the conflict is highly unlikely to dissipate through further consideration of the issue in those or other circuits. Furthermore, while the issue has not arisen frequently, the court of appeals' decisions document that it is a recurring one and the government, in fact, intends to continue to prosecute violations of Section 922(g)(1) based on foreign convictions. In addition, the Bureau of Alcohol, Tobacco, Firearms and Explosives has a strong interest in being able to administer federal firearms law on a uniform national basis. Therefore, the government does not oppose granting the petition for a writ of certiorari.

The Third Circuit's decision in this case holding that the phrase "convicted in any court" embraces convictions entered by foreign courts is consistent with rulings of the Fourth and Sixth Circuits. In *United States* v. *Winson*, 793 F.2d 754 (1986), the Sixth Circuit interpreted the phrase "any court" in 18 U.S.C. 922(h)(1), a predecessor to Section 922(g)(1). Section

[2] Petitioner does not seek this Court's review of the court of appeals' holding (Pet. App. 6a) that his Japanese convictions were obtained in a fundamentally fair manner. See Pet. 3 n.1.

922(h)(1) prohibited the possession of firearms by any person "who is under indictment for, or who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year." 18 U.S.C. 922(h)(1) (1982). The *Winson* court held that the words "any court" are unambiguous in their scope and thus are not limited to convictions entered by domestic courts. *Winson*, 793 F.2d at 757. The court further explained that the purpose of the statute was to prevent the possession of firearms by individuals convicted of serious crimes, and the court could "perceive no reason why the commission of serious crimes elsewhere in the world is likely to make the person so convicted less dangerous than he whose crimes were committed within the United States." *Id.* at 758.

The Fourth Circuit agreed, holding in *United States* v. *Atkins*, 872 F.2d 94, cert. denied, 493 U.S. 836 (1989), that the language of Section 922(g)(1) unambiguously manifests Congress's intent that foreign convictions be included within the scope of the provision. *Id.* at 96. The court of appeals reasoned that "'[a]ny' is hardly an ambiguous term, being all-inclusive in nature." *Ibid.*[3]

The Tenth and Second Circuits, however, have taken the contrary view. In *United States* v. *Concha*, 233 F.3d 1249 (2000), the Tenth Circuit overturned a sentencing enhancement under the Armed Career Criminal Act, 18 U.S.C. 924(e)(1), on the ground that foreign convictions are not within the ambit of Section 922(g)(1). Section 924(e) imposes a mandatory mini-

[3] A number of courts have interpreted "any court" to include military courts. See *United States* v. *Martinez*, 122 F.3d 421, 424 (7th Cir. 1997); *United States* v. *MacDonald*, 992 F.2d 967, 969-970 (9th Cir. 1993); *United States* v. *Lee*, 428 F.2d 917, 920 (6th Cir. 1970), cert. denied, 404 U.S. 1017 (1972).

mum sentence of 15 years on a person who violates Section 922(g) and "has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both." 18 U.S.C. 924(e)(1). In *Concha*, the government predicated the sentencing enhancement on three convictions entered in the United Kingdom. 233 F.3d at 1253. A divided court of appeals held, however, that foreign convictions were not "convictions by any court" for the purposes of Sections 922(g)(1) and 924(e)(1). *Ibid.* The majority noted that Congress defined "crime punishable by imprisonment for a term exceeding one year" to exclude federal or state business crimes, including antitrust violations, unfair trade practices, and restraints of trade, and certain state-law misdemeanors. 18 U.S.C. 921(a)(20). The majority expressed concern that applying Section 922(g)(1) to include foreign crimes would result in the "anomalous situation that fewer domestic crimes would be covered than would be foreign crimes," because foreign business crimes are not excepted. 233 F.3d at 1254. The majority further noted (*ibid.*) that the Sentencing Guidelines limit enhancements based on prior controlled substance offenses, Sentencing Guidelines § 2K2.1, to offenses arising under federal and state law. See Sentencing Guidelines § 4B1.2[4] Finally, the majority expressed concern that defendants might have difficulty collaterally attacking their foreign predicate convictions. *Id.* at 1255.

[4] Section 4A1.3 of the Sentencing Guidelines, however, separately provides that foreign convictions may be used to determine a defendant's sentence where the defendant's criminal history otherwise would not adequately reflect his past criminal conduct or his likelihood of recidivism. See Sentencing Guidelines § 4A1.3, comment (n.2(A)(i)); *United States* v. *Concha*, 294 F.3d 1248, 1251 (10th Cir. 2002), cert. denied, 537 U.S. 1145 (2003).

Judge Baldock dissented. *Concha*, 233 F.3d at 1257. He emphasized that "[a]bsolutely nothing in the plain and unambiguous language of § 924(e)(1) indicates that Congress intended to exclude from the statute's coverage a dangerous felon whose unlawful conduct occurred outside the United States," and that policy reasons "why Congress could have excluded such a felon * * * do not justify altering the statute's plain language by judicial fiat." *Ibid.*

In *United States* v. *Gayle*, 342 F.3d 89 (2003), as amended on rehearing (Jan. 7, 2004), the Second Circuit followed the Tenth Circuit's lead and overturned a conviction under Section 922(g)(1) on the ground that the term "convicted in any court" refers exclusively to domestic convictions. Finding the statute ambiguous for the reasons provided by the Tenth Circuit in *Concha*, the court turned to the legislative history and found "illuminating" a Conference Report's silence about the coverage of foreign convictions. 342 F.3d at 95 n.6. The court further found troubling the "complete silence of the statute" on "the question whether the prohibition should apply to those convicted by procedures and methods that did not conform to minimum standards of justice." *Id.* at 95.[5]

The division in the courts of appeals is not likely to be resolved without intervention by this Court.[6] Restoring

[5] On February 11, 2004, the Second Circuit denied the government's petition for rehearing en banc in *Gayle*.

[6] District courts have issued conflicting decisions as well. Compare *United States* v. *Jalbert*, 242 F. Supp. 2d 44, 47 (D. Me. 2003) ("The phrase 'any court,' on its face, encompasses foreign as well as domestic courts."), and *United States* v. *Chant*, Nos. CR 94-1149 & CR 94-0185, 1997 WL 231105, at *1-*3 (N.D. Cal. Apr. 4, 1997) (concluding that "A Foreign Conviction May Serve as the Predicate Offense for a Violation of 18 U.S.C. § 922(g)(1)"), aff'd on other grounds, No. 98-10088, 1999 WL 1021460 (9th Cir. Nov. 9, 1999) (201 F.3d 445 (Table)), with *Bean* v. *United States*, 89 F. Supp. 2d 828, 838 (E.D. Tex. 2000) (holding that Section 922(g)(1) does not include foreign predicate convictions), aff'd, 253 F.3d 234 (5th Cir. 2001), rev'd on other grounds, 537 U.S. 71 (2002).

uniformity to the interpretation of a federal criminal provision is a valid basis for this Court to exercise its discretion to grant the petition for a writ of certiorari. See Sup. Ct. R. 10(a).

The government notes, however, that the issue that has divided the courts of appeals has not arisen frequently. The fact that only five court of appeals and three district court decisions over the course of 18 years have been reported suggests that prosecutions under Section 922(g)(1) that rely upon foreign convictions are relatively infrequent. The government also is not aware of any other prosecutions currently pending that are contingent upon construing Section 922(g)(1) to embrace foreign convictions. The Court thus could elect to allow further development of the issue in the lower courts in order to assess its practical significance.

The issue, nevertheless, is a recurring one. Three of the court of appeals decisions and two of the district court decisions have arisen in the last three years. The government, moreover, intends to continue to bring prosecutions under Section 922(g)(1) based on foreign convictions in appropriate cases. And the Bureau of Alcohol, Tobacco, Firearms and Explosives has an interest in being able to apply a uniform national rule in regulating or giving advice to persons with foreign convictions who seek to become licensed firearm importers, manufacturers, or dealers, or who seek to possess firearms.

Finally, Congress's recent enactment of other legislation that predicates criminal liability on convictions entered "in any court" suggests that definitive guidance by this Court would be of value at this time. See 18 U.S.C. 175b(d)(2)(B) (prohibition on possession of biological weapons), added by Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, Title VIII, § 817(2), 115 Stat. 386 (Oct. 26, 2001).[7]

CONCLUSION

The government does not oppose the granting of the petition for a writ of certiorari in this case.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General
Counsel of Record
CHRISTOPHER A. WRAY
Assistant Attorney General
JOHN A. DRENNAN
Attorney

FEBRUARY 2004

---

[7] The same issue could also arise under similarly worded provisions involving the federal regulation of explosive materials, 18 U.S.C. 842(d)(2) and 842(i)(1), but the government is not aware of any reported cases raising the foreign conviction issue under those provisions. The issue could have significance in the immigration area as well, because the Immigration and Nationality Act's definition of "aggravated felony" cross-references convictions under Section 922(g)(1). See 8 U.S.C. 1101(a)(43)(E)(ii).